Supreme Court, U.S.
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Nos. 96-987 and 96-1389

In the Supreme Court of the United States

OCTOBER TERM, 1996

B.C. FOREMAN, ET AL., APPELLANTS

v.

DALLAS COUNTY, TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Attorney General, when preclearing changes to a state election code under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, also precleared specific changes that did not appear on the face of the statute, were never identified by the submitting jurisdiction, and were not addressed in the Attorney General's preclearance letter.

2. Whether the district court erred in ruling that a change in the procedures a county uses to select election judges is not a change in voting practices or procedures subject to Section 5 of the Voting Rights Act of 1965.

3. Whether an appeal from the denial of a preliminary injunction in a case under Section 5 of the Voting Rights Act of 1965 is moot when the court has issued an intervening order dismissing the case on the merits.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellants, who are former election judges in Dallas County, Texas, brought this action alleging that Dallas County had changed its procedures for appointing election judges in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, a covered jurisdiction may not implement a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on the date it became covered by the Act, unless it first obtains administrative

preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia. *Ibid.* Dallas County is a political subdivision of Texas covered under Section 5 with respect to voting practices "different from th[ose] in force or effect on November 1, 1972." *Ibid.*; 28 C.F.R. Pt. 51, App.

2. The parties agree that the current record does not establish the precise procedures Dallas County used to select election judges on November 1, 1972. J.S. 3; Mot. to Aff. 4. On that date, the relevant state statute provided simply that "[t]he [county] commissioners court at its July term shall appoint" for each precinct "one qualified voter as presiding judge of elections" and "one qualified voter as alternate presiding judge." 1969 Tex. Gen. Laws 2662 (Ch. 878, § 2), codified at Tex. Elec. Code Ann., Art. 3.01(a) (West Supp. 1970). In 1985, Texas enacted comprehensive revisions to its election code and submitted those revisions to the Attorney General for Section 5 preclearance. J.S. App. 38a-46a. The provisions concerning the appointment of election judges were recodified in Texas Election Code Ann. § 32.002 (West 1986).[1] In its Section 5 submission, the State ex-

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[1] Section 32.002 provides:

> (a) The commissioners court, at its July term each year, shall appoint the election judges for each regular county election precinct.
>
> (b) Judges appointed under Subsection (a) serve for a term of one year beginning on August 1 following the appointment.
>
> (c) The commissioners court shall fill a vacancy in the position of election judge for the remainder of the

plained that the revisions to Section 32.002 merely "clarif[ied] the beginning date and duration of the appointment of an election judge for a county election precinct." J.S. App. 41a. The Attorney General precleared the revisions to the Texas Election Code on August 16, 1985. *Id.* at 47a-49a. The preclearance letter reminded the State that "officials of the State of Texas and its political subdivisions are not relieved of their responsibility to seek preclearance, pursuant to * * * [S]ection 5, of any changes affecting voting * * * implemented as a result of the provisions of [the precleared revisions]." *Id.* at 48a.

3. The parties have stipulated that, since 1983, the Dallas County Commissioners Court (Commissioners Court) has used four different procedures or standards for selecting election judges, none of which has been precleared. J.S. App. 14a-15a. First, from at least 1983 through the 1994 election, the Commissioners Court appointed election judges using the "Presidential precinct method," under which the nominee (typically the precinct chair) of the party whose candidate carried the precinct in the last

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unexpired term. An appointment to fill a vacancy may be made at any regular or special term of the court.

(d) The county clerk shall recommend a presiding judge and an alternate judge for each precinct and shall submit a list of the recommendations to the commissioners court. The clerk shall also recommend an appointee for each unexpired term. The court shall consider the clerk's recommendation before making an appointment.

(e) Subject to Section 32.003, the judges appointed under this section shall serve in each election ordered by the governor or a county authority in which the regular county election precincts are required to be used.

presidential election was named the presiding election judge, and the opposing party's nominee was named the alternate judge. *Id.* at 12a-13a, 20a-21a; J.S. 4-5; Mot. to Aff. 4. An alternate judge has no independent authority or responsibilities, but simply performs the duties of an election judge when the presiding judge is unable to serve. Tex. Elec. Code Ann. § 32.001 (West 1986); J.S. App. 24a.

The second procedure or standard was adopted on August 8, 1995, when the Commissioners Court enacted a change from the "Presidential precinct method" to the "U.S. Senatorial precinct method." J.S. App. 13a. Under this new standard, the presiding judge came from the party whose senatorial candidate carried the precinct in the last election, while the alternate judge came from the opposing party. *Ibid.*; J.S. 5; Mot. to Aff. 5.

The third procedure, "the Republican precinct method," was enacted on September 3, 1996, when the Commissioners Court ordered that the results of the last U.S. Senatorial race would be used to select election judges only in those precincts in which the Republican candidate had prevailed. In all other precincts, the Election Commissioner who represented that precinct would select the presiding and alternate judges from lists submitted by the parties. J.S. App. 13a-14a.

The final procedure or standard was instituted on October 8, 1996, when the Commissioners Court issued an order rescinding "any and all policies or practices that provided a method of selecting and appointing presiding [election] judges in Dallas County by any method other than that set out in Tex. Elec. Code § 32.002." J.S. App. 14a, 22a. Because Section 32.002 does not prescribe any specific method

for selecting election judges, that order allowed the Commissioners Court to make appointments without reference to any past election results. Under that order, the Commissioners Court appointed only Republican election judges, leaving some positions vacant. *Id.* at 14a-15a. The parties stipulated that the precincts in which the position was left vacant as a result of that order "are primarily precincts in which blacks and/or Hispanics constitute a majority of the precincts' voters." *Id.* at 15a.

4. On September 30, 1996, the United States Department of Justice notified the Commissioners Court that it had received information that Dallas County had changed its method for selecting election judges in 1995 and 1996, and that those changes had not been precleared under Section 5. J.S. App. 36a-37a. The Department of Justice stated that the changes were "legally unenforceable without Section 5 preclearance," and asked the County to submit the changes for preclearance. *Id.* at 37a. Dallas County did not comply with the request.

5. On October 3, 1996, appellants, African-American and Hispanic voters who had served as election judges in Dallas County but who would not be reappointed as a result of the Commissioners Court's September 3, 1996, order, filed their original complaint. They alleged that the August 1995 and September 1996 changes in the method of selecting election judges "constitute changes affecting voting within the meaning of Section 5" that had not been precleared as required by Section 5, and that failure to obtain preclearance "renders the voting changes legally unenforceable" until preclearance is obtained. Compl. ¶¶ 12, 13, 15. Appellants asked the three-judge court to declare that "the changes in the method used

to select election judges constitute changes affecting voting within the meaning of Section 5"; to enjoin appellees from conducting any future elections using any method that has not been precleared; to order "that the selection of election judges in the 1996 elections be conducted using the last legally enforceable method of selecting election judges in Dallas County, Texas," or alternatively, the Presidential precinct method as an interim measure, pending preclearance of any other method; and to grant such further relief "as the interest of justice may require." Compl. ¶ 16.

On October 8, 1996, after the Commissioners Court issued its order rescinding prior methods for selecting election judges, appellees moved to dismiss the original complaint on mootness grounds, arguing that the county had "abandoned the use of any formula or procedure that has not been precleared and is relying entirely on section 32.002 of the Election Code, which has received Section 5 preclearance." Br. in Supp. of Defs' Suggestion of Mootness 4. On October 10, appellants amended their complaint to allege that the method adopted in the Commissioners Court's October 1996 order, whereby only Republicans were appointed election judges and no judges were appointed in some precincts, also violates Section 5. Amended Compl. ¶¶ 12, 13. Appellants also filed an amended motion for a preliminary injunction to prevent appellees from implementing any unprecleared changes in the practices or procedures used to select election judges for future elections. In opposing that motion, appellees did not contest that Section 32.002 is a voting practice or procedure within the meaning of Section 5. Br. in Opp. to Pltfs' Second Preliminary Injunction Applic. 5. They contended, however, that

the statute set forth the only "practice or procedure" requiring preclearance under Section 5. *Id.* at 5-12.

6. On October 18, 1996, a three-judge court denied appellants' motion for injunctive relief. J.S. App. 1a-4a. The court concluded that the Department of Justice had precleared Section 32.002, *id.* at 2a, and, in so doing, had "precleared the process for selecting election judges in Texas," *id.* at 3a. That process, concluded the court, "confers discretionary authority on the Commissioners Court to appoint election judges, and * * * the exercise of th[at] discretion is not subject to preclearance." *Id.* at 2a. The court held that there was no "change" requiring preclearance, noting the "constancy" among the plans in their reliance on "partisan affiliation as an informing principle." *Id.* at 3a-4a. The court expressly refrained from making any finding about the methods in effect on November 1, 1972, the coverage date for Dallas County: "[W]e do not find that any methods in effect prior to 1982 have adequately been presented. We therefore decline to consider them in reaching our decision." *Id.* at 2a n.*. On October 18, 1996, appellants appealed from the order denying their motion for a preliminary injunction. *Id.* at 9a.

On February 7, 1997, the three-judge court granted appellees' motion to dismiss appellants' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, stating that "the decision of the three-judge court denying plaintiffs' application for a preliminary injunction establishes that plaintiffs have failed to state a § 5 claim on which relief can be granted." J.S. App. 66a (No. 96-1389). On February 21, appellants appealed from the dismissal of their complaint. *Id.* at 70a-71a.

DISCUSSION

The order dismissing appellants' complaint (No. 96-1389) should be summarily vacated and remanded for further consideration. Under this Court's precedents, the three-judge court committed reversible error both in concluding that the Attorney General precleared Dallas County's procedures for selecting election judges when he precleared the 1985 recodification of the Texas Election Code, and in holding that a change in the specific standard, practice, or procedure used to appoint election judges is not subject to Section 5 preclearance.

Plenary review is not appropriate, however, on the question whether there has, in fact, been a change in voting practices or procedures subject to Section 5. Although appellees argue that the Commissioners Court's October 8, 1996, order resulted in a return to the practices in effect on November 1, 1972, Dallas County's Section 5 coverage date, the three-judge court expressly found that the record was inadequate to determine any methods that were in effect before 1982. J.S. App. 2a n.*. If, on remand, the three-judge court concludes, based on a more developed record, that the practices or procedures adopted by the Commissioners Court on October 8, 1996, are not, in fact, those that were in effect on November 1, 1972, the court must hold that the October 1996 order implemented a change subject to Section 5 preclearance. If, however, the three-judge court concludes that the practices in effect since October 8, 1996, are, in fact, those that were in effect in November 1972, it must then determine whether reversion to those methods constitutes a "change" that is subject to Section 5 preclearance. As that issue is merely

theoretical on the current record, this Court's consideration of it would be premature. The Court therefore should vacate and remand the order dismissing the appeal (No. 96-1389) and dismiss as moot the order denying appellants' motion for a preliminary injunction (No. 96-987).

1. The district court erred in dismissing appellants' complaint under Section 5 of the Voting Rights Act of 1965. Its conclusion that the Attorney General's 1985 preclearance of revisions to the Texas Election Code precleared changes in the standards, practices, or procedures by which the Commissioners Court appoints election judges is in conflict with this Court's precedents requiring that proposed changes in voting requirements be specifically identified in Section 5 submissions. Its holding that changes in the practices or procedures for selecting election judges are not subject to Section 5's preclearance requirements disregards this Court's precedents establishing that actions taken pursuant to a precleared statute must themselves be precleared if they result in a change to a voting standard, practice, or procedure.

a. The district court erred in ruling that the Attorney General precleared Dallas County's procedures for selecting election judges when he precleared Section 32.002. This Court consistently has interpreted Section 5's preclearance provision to "requir[e] that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for [her] consideration pursuant to the Act." *McCain* v. *Lybrand*, 465 U.S. 236, 249 (1984) (quoting *Whitley* v. *Williams*, 393 U.S. 544 (1969)); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S.

110, 136 (1978). A State's Section 5 submission must "identify with specificity each change that it wishes the Attorney General to consider." *Clark* v. *Roemer*, 500 U.S. 646, 658 (1991). Applying a "presumption that 'any ambiguity in the scope of [a] preclearance request' must be construed against the submitting jurisdiction," *id.* at 659 (quoting *McCain* v. *Lybrand*, 456 U.S. at 257); accord *Young* v. *Fordice*, 117 S. Ct. 1228, 1237 (1997), this Court consistently has held that the Attorney General's preclearance applies only to those changes in voting that a jurisdiction has specifically identified as a change, and that the Attorney General has, in fact, reviewed, see, *e.g.*, *Lopez* v. *Monterey County*, 117 S. Ct. 340, 344-345 (1996) (Attorney General's preclearance of 1983 law concerning consolidation of judicial districts did not preclear previous consolidation ordinances); *Clark* v. *Roemer*, 500 U.S. at 657-658 (preclearance of change in number of judges in judicial district did not preclear prior changes not specifically identified); *McCain* v. *Lybrand*, *supra* (Attorney General's lack of objection to amendment of statute did not ratify voting changes embodied in initial enactment of same statute).[2]

Under this precedent, the court below clearly erred in ruling that, by preclearing the 1985 voting changes under the Texas Election Code, "the Department of

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[2] Consistent with this precedent, the Attorney General's regulations require that, "[i]f the change affecting voting" is not readily apparent on the face of the documents, the submission must include "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and [the] proposed situation with respect to voting." 28 C.F.R. 51.27(c).

Justice precleared the process for selecting election judges in Texas." J.S. App. 3a. In its Section 5 submission, Texas expressly advised the Attorney General that the revision to Section 32.002 merely "clarif[ied] the beginning date and duration of the appointment of an election judge for a county election precinct." J.S. App. 41a. Other than requiring that each commissioners court consider recommendations by the county clerk, the language of Section 32.002 does not identify any change in the practices or procedures that commissioners courts are to use in selecting election judges. It does not prescribe whether or how previous election results should be taken into account, nor does it specify that commissioners courts should use the Presidential precinct method, the U.S. Senatorial precinct method, or the Republican precinct method—the procedures that Dallas County used between 1985 and 1996.[3]

Further, the Attorney General's letter preclearing those voting changes that Texas had identified did not indicate that the Department of Justice had reviewed or approved the general practice of using success in past elections as a standard for appointing election judges, or the specific practice of relying on the precinct level results of a particular election. J.S. App. 47a-52a. In fact, the Attorney General emphasized that state and local officials remained responsible for seeking preclearance of any changes affecting voting implemented as a result of the precleared provisions.

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[3] The State's 1985 submission identified several other provisions in the Texas Election Code that were being revised or recodified, see J.S. App. 41a-42a, but, as with Section 32.002, none of those sections identifies any method that a commissioners court is to use to appoint election judges.

Id. at 48a. Therefore, the three-judge court's conclusion that the Attorney General precleared the Commissioners Court's use of "partisan affiliation" to appoint election judges is plainly incorrect.[4]

b. The district court also held that the Commissioners Court's successive changes in its method for selecting election judges—including the Presidential precinct method, the Senatorial precinct method, and the "appointment of Republicans across the board"—do not constitute "change[s] in election practice[s] or procedure[s] contemplated by § 5 of the Voting Rights Act." J.S. App. 3a. It reasoned that, because Section 32.002 "left to the local political government" the discretion to select election judges, changes reflecting "shifting accommodations of partisan power" are not reviewable as changes under Section 5. *Ibid.* The district court's reasoning and conclusion are incorrect.

The district court appeared to conclude that, where a jurisdiction has discretion with respect to a voting standard, practice, or procedure, the exercise of that discretion is not reviewable. That conclusion is wrong with respect to Dallas County's changes to its

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[4] That conclusion constitutes reversible error, whether the error is legal or factual. See *McCain* v. *Lybrand*, 465 U.S. at 257-258 (to the extent that district court's conclusion that Attorney General precleared certain changes reflected failure to resolve ambiguities against submitting jurisdiction, it was legal error; to the extent that conclusion rested on factual finding, it was clearly erroneous); see also *Young* v. *Fordice*, 117 S. Ct. at 1233, 1239 (disagreeing with district court's conclusion that Attorney General had precleared certain voting changes, without characterizing lower court's error as legal or factual); *Clark* v. *Roemer*, 500 U.S. at 658 (district court's conclusion that Attorney General had precleared certain voting changes reflected "factual and legal errors").

methods for selecting election judges. Actions taken pursuant to a precleared statute must themselves be precleared if they produce a change in a voting standard, practice, or procedure. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (even "an administrative effort to comply with a statute that had already received preclearance" required separate preclearance when it changed the qualifying period for an election); *Blanding* v. *DuBose*, 454 U.S. 393 (1982) (per curiam) (after Attorney General had precleared South Carolina statute giving counties discretion to select form of local government and to choose between at-large and single-member districts, county's exercise of that discretion was also subject to preclearance); see also *United States* v. *Texas*, No. SA-85-CA-2199 (W.D. Tex. Aug. 1, 1985) (three-judge court) (although existing state law permitted Governor to call emergency special elections, if date of election differed from date otherwise prescribed by statute, emergency election plan was subject to Section 5 preclearance), aff'd mem., 474 U.S. 1078 (1986) (J.S. App. 53a).

This is not a case in which the simple "ebb and flow of political power," J.S. App. 3a, changed the composition of the election judges, as would have occurred, for example, if the Commissioners Court had retained the Presidential precinct method, under which the election results favored the Democrats in one election and the Republicans in the next. Rather, in the exercise of its acknowledged discretion to consider partisan affiliation in appointing election judges, the Commissioners Court enacted several successive changes in the practices and procedures it used for doing so. First, when its procedures expressly relied on election results, it changed the election (presiden-

tial to senatorial) on which it relied. See *id.* at 13a. Next, it changed the manner in which it considered those election results (from considering the results in all precincts to considering the results only in precincts where Republicans prevailed). *Id.* at 13a-14a. Finally, in October 1996, when it rescinded its prior orders, it disavowed any express reliance on past election results. *Id.* at 14a, 22a. Because each of those changes in Dallas County's method of selecting election judges is a change affecting voting within the meaning of Section 5,[5] each is subject to preclearance.

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[5] The dispute in this case is not whether procedures affecting election judges are procedures that affect voting. Appellees concede that "the statute creating the position of election judges is an election procedure requiring section 5 preclearance." Mot. to Aff. 10. See 42 U.S.C. 1973b(a)(1)(F)(iii) (to exempt itself from preclearance requirements, a covered jurisdiction must demonstrate that it has "engaged in * * * constructive efforts, such as * * * the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process"); H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981) (listing "refusal to appoint minority registration and election officials" among "numerous practices and procedures which act as continued barriers to registration and voting").

The election judges' performance of their duties affects voting and therefore "bear[s] a direct relation to voting itself." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 510 (1992). They have broad "responsib[ility] for the management and conduct of the election at the polling place of the election precinct that [they] serv[e]." Tex. Elec. Code Ann. § 32.071 (West 1986). They are authorized to prevent violations of the election code and issue arrest warrants, *id.* § 32.075; to determine when ballots may be counted, *id.* § 65.002(b); and to select the clerks who assist in the conduct of the election, *id.* § 32.031. As election officers, election judges are entrusted to assist voters who are disabled or illiterate, *id.* § 64.031; to decide if

The district court based its dismissal of appellants' Section 5 claim in part upon its finding that the "informing principle" underlying each method was "partisan affiliation." J.S. App. 3a. To the extent that the district court delved into the purpose behind Dallas County's change from one procedure to another (see Opp. to Mot. to Aff. 4-6), the district court plainly "misconceived the permissible scope of its inquiry into appellants' allegations." *Perkins* v. *Mathews*, 400 U.S. 379, 383 (1971) (citing *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969)). This Court consistently has held that, in a challenge to a jurisdiction's failure to obtain preclearance under Section 5, "[t]he three-judge district court may determine only whether § 5 covers a contested change, whether § 5's approval requirements were met, and, if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Lopez* v. *Monterey County*, 117 S. Ct. at 349 (citing *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642, 645-647 (1977) (per curiam); *Perkins* v. *Mathews*, 400 U.S. at 385; *Allen* v. *State Bd. of Elections*, 393 U.S. at 558-559). Consideration of the

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voters possess the requisite qualifications to vote, *id.* § 63.001 (& Supp. 1997); and to determine which irregularly marked ballots may be counted, *id.* § 65.009. Certainly, when the Commissioners Court adopted a method of selecting election judges that resulted in leaving the position vacant in many predominantly Hispanic and African-American precincts, see J.S. App. 15a, that was a change to a procedure affecting voting that had a "potential for discrimination." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. at 181.

purpose or effect of the change is "expressly reserved" for the United States District Court for the District of Columbia or the Attorney General. *Ibid.* (quoting *Perkins* v. *Mathews*, 400 U.S. at 385). Under that established precedent, the purpose of the changes implemented by the Commissioners Court had no place in the district court's Section 5 analysis. If, as it appears, the district court relied on that purpose as a basis for concluding that the voting changes were not covered by Section 5, that erroneous reliance constitutes yet another ground for reversing that aspect of its judgment.

c. Appellees' final contention cannot be conclusively resolved on the current record. Appellees contend that, because the Commissioners Court, through its October 8, 1996, order, voluntarily reverted to the practices in force or effect on November 1, 1972, this Court should affirm the judgment below. Mot. to Aff. 14-19.

The record in this case does not disclose, however, whether the Commissioners Court actually has reverted to practices that were in force or effect in 1972. Rather than allow discovery on that question, the three-judge court "decline[d] to consider" any methods in effect before 1982. J.S. App. 2a n.*.[6] If, on

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[6] The court's refusal to allow discovery on that factual question was itself error. A court may dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984) (citing *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). Appellants' amended complaint alleged that Dallas County's implementation of its October 8, 1996, order resulted in changes in procedures requiring preclearance under Section 5, which took effect in

remand, a more fully developed record reveals that the practices in effect on October 8, 1996, are not in fact those that were in force or effect in November 1972, then the district court would have to find that the newly enacted procedures are a change that requires Section 5 preclearance. The district court could then resolve this case by enjoining Dallas County from enforcing those procedures until it has obtained a declaratory judgment from the United States District Court for the District of Columbia or preclearance from the Attorney General, *Lopez* v. *Monterey County*, 117 S. Ct. at 347, and by considering whether other relief is necessary to address any continuing effects of the implementation of the unprecleared changes, *Perkins* v. *Mathews*, 400 U.S. at 396-397.

If, on the other hand, the amplified record discloses that Dallas County has returned to the very practices that were in force or effect on November 1, 1972, the district court would need to address unresolved questions about the effect of unprecleared changes on the Section 5 preclearance process. Appellees contend that a jurisdiction's reversion to the practice in effect on the coverage date does not implicate Section 5, which requires preclearance only for a voting practice "different from that in force or effect" on the coverage date. Mot. to Aff. 14-18. Appellants assert that, because a reversion to a practice in force or effect on the coverage date would constitute a change from more recent, but unprecleared, practices in force

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Dallas County on November 1, 1972. Amended Compl. ¶ 12. Accordingly, the district court should have denied the motion to dismiss and allowed both parties to take discovery and present evidence of Dallas County's practices for appointing election judges from November 1, 1972, until 1983, when the County changed to the Presidential method.

or effect, that reversion must be precleared. J.S. 24-28.

While the text of Section 5 requires preclearance only for standards, practices, or procedures that are "different from th[ose] in force or effect on [the date of coverage]," 42 U.S.C. 1973c, the statute does not address the effect of intervening changes, either precleared or not. Generally, if a jurisdiction has precleared a change from the voting practice in force or effect on the coverage date, that new practice becomes the "baseline standard" for determining whether any future practices or procedures are " 'different' enough * * * to require preclearance." *Young* v. *Fordice*, 117 S. Ct. at 1234 (citing *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 495 (1992)). It is as yet unresolved, however, whether a voting change that has been in force or effect, but not precleared, may be considered in evaluating future changes under Section 5, even though the unprecleared change may not be enforced.[7]

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[7] *White* v. *Dougherty County Board of Education*, 579 F. Supp. 1480 (M.D. Ga. 1984) (three-judge court), raised the question whether a covered jurisdiction's change in its policies concerning unpaid leaves for employees who sought to perform the duties of an elected office was subject to Section 5. The three-judge court concluded that the defendant school board had not, in fact, changed its policies in this regard, so there was no change to preclear. *Id.* at 1493. The district court therefore did not reach the question whether the county's reversion to a practice that predated coverage under Section 5 is a change that must be precleared. *Ibid.* Plaintiffs appealed, and this Court summarily affirmed. 470 U.S. 1067 (1985). In a brief filed at the Court's invitation, the United States stated that, if the jurisdiction had returned to the practice in effect on the coverage date, that decision would not be subject to Section 5. See Brief for the United States at 10-15, *White*,

In our view, resolution of that question is not warranted on the basis of the current record. Rather, this case is procedurally analogous to *Berry* v. *Doles*, 438 U.S. 190 (1978) (per curiam). In *Berry*, the Court summarily vacated and remanded the district court's denial of appellants' request to set aside results of an election held under an unprecleared change to Georgia's voting laws. This Court stated that the difficult issue of the propriety of the relief could be avoided if Georgia's application under Section 5 for preclearance of a voting change was granted. If preclearance was denied, the plaintiffs would be free to request specific injunctive relief. *Id.* at 193. If preclearance was granted, the case would be at an end, and the necessity to address difficult legal issues would be avoided. *Ibid.*; accord *Statewide Reapportionment Advisory Comm.* v. *Theodore*, 508 U.S. 968 (1993) (summarily vacating district court's decision and remanding for further proceedings to determine if the court's redistricting plans complied with Section 2 of Voting Rights Act); see also *Lopez* v. *Monterey County*, 117 S. Ct. at 347 (issues concerning scope of Section 5 coverage to be considered in first instance by district court on remand); *Reno* v. *Bossier Parish School Bd.*, No. 95-1455 (May 12, 1997), slip op. 14-15 (vacating and remanding in part in Section 5 case to allow district court to consider evidence of redistricting plan's dilutive impact).

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supra (No. 83-1868). Should the district court in this case need to reach appellants' claim that Dallas County's reversion to the practice it used on the date of coverage should be precleared, or should this Court note probable jurisdiction, the United States will address whether the circumstances in this case warrant a different conclusion than that advocated in *White*.

As in *Berry*, this case may be easily disposed of once the district court determines whether Dallas County actually has reverted to the same practice it used in 1972. If it has not, the new procedure is subject to Section 5 and must be precleared, and "the matter will be at an end." 438 U.S. at 193. In light of the unresolved factual questions, however, plenary consideration of that issue would be inappropriate at this time. The Court should summarily vacate that aspect of the judgment and remand the case to the three-judge court for appropriate consideration of the procedures actually in effect now and in November 1972.

2. The three-judge court's dismissal of appellants' complaint moots the appeal from the order denying their motion for a preliminary injunction. On February 7, 1997, when the district court dismissed appellants' complaint, the court's earlier denial of appellants' preliminary injunction merged into the final judgment of dismissal. Thus, the appeal from the order denying appellants' preliminary injunction should be dismissed as moot. *Shaffer* v. *Carter*, 252 U.S. 37, 44 (1920) (appeal from denial of interlocutory application for injunction becomes merged in final decree and should be dismissed as moot); accord *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 588-589 (1926) (appeal from order granting interlocutory injunction is merged into final decree).

CONCLUSION

With regard to the appeal from the order dismissing the complaint (No. 96-1389), this Court should summarily vacate the judgment and remand the case to the district court for further proceedings. If the case is not summarily vacated, this Court should note probable jurisdiction. The appeal from the denial of appellants' motion for a preliminary injunction (No. 96-987) should be dismissed as moot.

Respectfully submitted.

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